

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2010 JAN -6 AM 10: 25

STATE OF TENNESSEE, *ex rel.*)
ROBERT E. COOPER, JR., ATTORNEY)
GENERAL and REPORTER,)

Plaintiff,)

v.)

MARCUS DONNELL JONES, individually)
and d/b/a JONES MEMORIALS, d/b/a)
www.jonesmemorials.com, a website owned)
and operated by MARCUS DONNELL JONES,)
and HALF OFF STONES, a sole proprietorship)
owned and operated by MARCUS DONNELL)
JONES, and d/b/a www.halfoffstones.com,)
a website owned and operated by MARCUS)
DONNELL JONES,)

Defendant Jones,)

and)

HENRY WAYNE MONK, individually and)
d/b/a MONK MEMORIALS, a sole)
proprietorship owned and operated by)
HENRY WAYNE MONK, and d/b/a)
www.monkmemorials.com, a website owned)
and operated by HENRY WAYNE MONK,)

Defendant Monk.)

RICHARD R. HOOKER, CLERK

P. W. W. D.C.

No. 08-C-3494

Judge Barbara Haynes

**FINAL JUDGMENT AND PERMANENT INJUNCTION BY DEFAULT AGAINST
HENRY WAYNE MONK, INDIVIDUALLY AND D/B/A MONK MEMORIALS, A SOLE
PROPRIETORSHIP OWNED AND OPERATED BY HENRY WAYNE MONK AND
D/B/A WWW.MONKMEMORIALS.COM, A WEBSITE OWNED AND OPERATED BY
HENRY WAYNE MONK, FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Following a Motion for Default of the Plaintiff, State of Tennessee, by and through the
Attorney General and Reporter, Robert E. Cooper, Jr. on behalf of Mary Clement, the Director of

the Division of Consumer Affairs of the Department of Commerce and Insurance and pursuant to Tenn. R. Civ. P. 55.05 and 38.05, it is hereby **ORDERED, ADJUDGED AND DECREED** that a Default Judgment be entered against the Defendant Henry Wayne Monk, individually and d/b/a Monk Memorials, a sole proprietorship owned and operated by Henry Wayne Monk and d/b/a www.monkmemorials.com, a website owned and operated by Henry Wayne Monk (hereinafter collectively referred to as "Defendant Monk") who has failed to answer or otherwise respond to the State's Complaint, subject to the terms contained herein. This Judgment comes following a hearing on the Plaintiff's motion on December 11, 2009 at 9:00 a.m. CST at the Davidson County Courthouse, Nashville, Tennessee in the courtroom for the Third Circuit Court of Davidson County, the Twentieth Judicial District, with Judge Barbara Haynes presiding. Defendant Wayne Henry Monk did not appear.

Counsel for the State notified the Court that Defendant Marcus Jones has retained, as of yesterday afternoon, an attorney, Karl Warden, to represent him, his sole proprietorships and internet websites. The State has agreed, at Attorney Warden's request, to continue the Motion for Default Judgment as to Marcus Jones and the Jones Defendants until the next motion day, Friday, January 8, 2010 at 9:00 a.m. CST. Consequently, the Motion for Default as it concerns Marcus Jones and the other captioned Defendant Jones as set forth in the caption, is continued until January 8, 2010.

This Final Default Judgment pertains to Henry Wayne Monk, and the other Monk Defendants as set forth above. Entry of this Final Default Judgment does not modify, in any manner, the State's pending Motion for Default against Marcus Jones, individually, d/b/a Jones Memorials, www.jonesmemorials.com, a website owned and operated by Marcus Donnell Jones, d/b/a Half Off Stones, a sole proprietorship owned and operated by Marcus Donnell Jones and

www.halffstones, a website owned and operated by Marcus Donnell Jones at times pertinent to the Complaint.

DEFINITIONS

For the purpose of this Final Default Judgment, the following definitions shall apply to the following terms:

- A. **"Advertise," "Advertisement" or "Advertising,"** shall mean any written, oral, graphic, or electronic statement, illustration, or depiction that is designed to create interest in the purchasing of, impart information about the attributes of, publicize the availability of, or affect the sale or use of, goods or services, whether the statement appears in a brochure, newspaper, magazine, free-standing insert, marketing kit, leaflet, mailer, book insert, letter, catalogue, poster, chart, billboard, electronic mail, website or other digital form, slide, radio, broadcast television, cable television, or commercial or infomercial whether live or recorded.
- B. **"And" and "Or"** shall be construed conjunctively or disjunctively as necessary, and to make the applicable phrase or sentence inclusive rather than exclusive.
- C. **"Asset" or "Assets"** shall mean any legal or equitable interest in, right to, or claim to, any real and personal property— including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, premises, contracts, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, funds, and all cash, wherever located.
- D. **"Attorney General"** shall mean Office of the Tennessee Attorney General.
- E. **"Consumer"** shall mean any person, a natural person, individual, governmental agency or other entities, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.
- F. **"Clear and Conspicuous" or "Clearly and Conspicuously."** A statement is "Clear and Conspicuous" or "Clearly and Conspicuously" disclosed if, by whatever medium, it is readily understandable and presented in such size, color, contrast, location, and audibility, compared to other information with which it is presented, that is readily apparent to the person to whom it is disclosed. If such statement is necessary as a

modification, explanation or clarification to other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner which is readily noticeable and understandable. Further, a disclosure of information is not clear and conspicuous if, among other things, it is obscured by the background against which it appears or there are other distracting elements. Warnings, safety disclosures or statements of limitation must be set out in close conjunction with the benefits described, or with appropriate captions of such prominence that warnings, disclosures or statements of limitation are not minimized, rendered obscure, presented in an ambiguous fashion, or intermingled with the context of the statement so as to be confusing or misleading or contrary. The statement shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the statement shall be used in any communication.

- G. **"Deceptive"** or **"Deception"** shall mean causing or tending to cause a consumer to believe what is false or misleading or tending to mislead a consumer as to a matter of fact. (*Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005)).
- H. **"Defendant Monk"** shall mean Henry Wayne Monk, individually, and d/b/a Monk Memorials, a sole proprietorship owned and operated by Henry Wayne Monk and d/b/a www.monkmemorials.com, a website owned and operated by Henry Wayne Monk captioned above and/or any and all officers, directors, owners, employees, sales staff, managers, partners, parents, subsidiaries, successors, related entities, future purchasers, merged parties, inheritors or other successors in interest, assigns, agents and representatives acting on behalf of Defendant Henry Wayne Monk.
- I. **"Division"** or **"Division of Consumer Affairs"** shall mean the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance.
- J. **"Document"** shall be synonymous in meaning and equal in scope to the usage of the term in Tenn. R. Civ. P. 34, and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained, extracted and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document.
- K. **"FTC Mail Order Rule"** or **"Federal Trade Commission Mail or Telephone Order Merchandise Rule"** shall mean the Federal Trade Commission rule set forth at 16 C.F.R. § 435.1 and as may be amended

from time to time, promulgated under the authority of 15 U.S.C. § 552, which describes unfair or deceptive acts or practices by a seller in connection with mail or telephone order sales in or affecting commerce, as "commerce" is defined in the Federal Trade Commission.

- L. **"Goods"** shall mean any tangible chattels leased, bought, or otherwise obtained for use by an individual primarily for personal, family, or household purposes of a franchise, distributorship agreement, or similar business opportunity.
- M. **"Judgment"** shall mean this final judgment and permanent injunction by default jointly and severally against Defendant Monk and findings of fact and conclusions of law entered in the above referenced matter.
- N. **"Including"** or **"Include"** shall mean "including, without limitation."
- O. **"Money"** or **"Monies"** in the context of refunds to consumers, includes all charges, fees, taxes or other valuable paid to Defendant Monk.
- P. **"Person"** shall mean a natural person, individual, organization or other legal entity, including a corporation, partnership, proprietorship, association, trust, estate, cooperative, limited liability company, government or governmental subdivision or agency, any legal or commercial entity however organized, or any other group or combination acting as an entity.
- Q. **"Personally Identifiable Information"** shall mean any "financial document" as defined by Tenn. Code Ann. § 47-18-2102(6) and shall mean any "Identification documents" as defined by Tenn. Code Ann. § 47-18-2102(7).
- R. **"Services"** shall mean any work, labor, or services including services furnished in connection with the sale or repair of goods or real property or improvements thereto.
- S. **"State," "State of Tennessee,"** or **"Attorney General"** shall mean the Plaintiff and shall mean the Office of the Tennessee Attorney General and Reporter.
- T. **"TCPA"** shall mean the Tennessee Consumer Protection Act of 1977 and related statutes found at Tenn. Code Ann. § 47-18-101 *et seq.* and as may be amended from time to time.
- U. **"Unfair"** or **"Unfairness"** shall mean causing substantial injury to consumers which is not reasonably avoidable by consumers themselves

and not outweighed by countervailing benefits to consumers or to competition. Substantial injury involves monetary injury. Injury will be considered substantial if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. Consumers cannot reasonably avoid injury when a merchant's sales practices unreasonable create or take advantage of an obstacle to the free exercise of consumer decision-making, including withholding important information from consumers, overt coercion, or exercising undue influence over a highly susceptible class of consumers. *Tucker v. Sierra Builders*, 180 S.W.3d 109, 117 (Tenn. Ct. App. 2005).

FINDINGS OF FACT

Upon review of the entire record, including the State's Motion for Default Judgment, the State's Complaint, the Summons and all attached Exhibits, the Court makes the following findings of fact:

1. The instant civil law enforcement proceeding was filed in this Court on August 10, 2009 alleging that the Defendant Monk violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.* by engaging in unfair or deceptive acts or practices including, but not limited to, failure to deliver headstones, tombstones, grave markers and other cemetery products and services to consumers who had paid in advance, either fully or partially.

2. On August 12, 2009, Defendant Monk was personally served with the State's Complaint.

3. On September 9, 2009, the State filed a Motion for Statutory Temporary Injunction and a Motion for Expedited Hearing.

4. On September 11, 2009, this Court entered an Order setting this matter for expedited hearing on September 18, 2009 at 9:00 a.m.

5. The State presented eleven (11) sworn affidavits of consumers with experiences consistent with the allegations in the State's Complaint.

6. The State presented a total of one hundred twenty-six (126) consumer complaints. Some consumers filed with more than one agency.

7. The Defendant Monk has failed to respond to the various agencies' efforts to resolve consumer complaints about seventy per cent (70%) of the time.

8. The State presented Defendant Monk's website, by capture or copy (pdf) through the Affidavits of Jim KempVanee and Nathan Casey.

9. No responsive pleading was filed to the State's Motion for Statutory Injunction.

10. Neither Defendant appeared on September 18, 2009 in opposition to the State's Motion for Statutory Temporary Injunction, Asset Freeze and Other Equitable Relief.

11. This Court entered its Order Granting Statutory Temporary Injunction and Asset Freeze on September 18, 2009.

12. No responsive pleading has been filed to the State's Complaint and Defendant Monk failed to appear at the hearing relating to the State's Motion for Default.

13. Counsel for the State, Meredith DeVault, was present and advised the Court that attorney Karl Warden contacted her yesterday afternoon, December 10, 2009, on behalf of Defendant Marcus Jones, individually and d/b/a Jones Memorials, www.jonesmemorials.com, Half Off Stones, d/b/a halfoffstones.com seeking an agreement to continue the State's motion for default judgment in order to file a response to the State's motion. Therefore, the hearing on the State's motion against Marcus Jones and the other Jones Defendants shall be heard on this Court's first available motion date, January 8, 2010 at 9:00 a.m.

14. Consequently, this Final Judgment and Permanent Injunction pertains only to Defendant Henry Wayne Monk, individually, and d/b/a Monk Memorials, a sole proprietorship owned and operated by Henry Wayne Monk and d/b/a www.monkmemorials.com, a website

owned and operated by Henry Wayne Monk captioned above and/or any and all officers, directors, owners, employees, sales staff, managers, partners, parents, subsidiaries, successors, related entities, future purchasers, merged parties, inheritors or other successors in interest, assigns, agents and representatives acting on behalf of Defendant Monk.

15. Defendant Monk has not filed an answer to the State's Complaint or otherwise insisted upon a jury trial or any of the derivative rights of a jury trial afforded to them under either the Constitutions of the United States or the State of Tennessee. Pursuant to Tenn. R. Civ. P. 38.05, the Defendant Monk has waived his right to a trial by jury (if any) by not asserting this right within fifteen (15) days of the last pleading raising an issue of fact.

16. Defendant Monk's actions in this case are governed by the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.*, which prohibits, among other things, unfair or deceptive acts and misrepresentations in trade or commerce; Defendant Monk's actions are governed by the state's common law and other state and federal laws.

17. This Court has jurisdiction of the subject matter of this case and Defendant Monk pursuant to Tenn. Code Ann. § 47-18-108.

18. Venue is proper in Davidson County, pursuant to Tenn. Code Ann. § 47-18-108(a)(3), because it is the county where the alleged unfair or deceptive acts or practices took place or are about to take place, and the county in which Defendant Monk conducts, transacts or has transacted business and the county where Defendant Wayne Monk resides.

19. Beginning in at least 2002, Defendant Monk, in his agency capacity for Defendant Jones, engaged in and continued to engage in trade or commerce, in whole or in part, in the State of Tennessee by offering goods or services to consumers. Specifically, Defendant Monk has

offered for sale headstones, grave markers, and other cemetery items to the public across the country.

20. Defendant Monk's unfair and deceptive acts alleged in the Complaint and supporting Exhibits, have caused consumers and other persons to suffer ascertainable losses. The exact number of affected consumers is unknown to the State, by reason of the use or employment of such various unfair, deceptive or misleading acts or practices alleged in the Complaint. At the present time, based on the information known to the State and attached to Plaintiff's Motion for Default Judgment, there are now one hundred (100) consumers who have filed a complaint to consumer agencies about their losses in consumer transactions with Defendant Wayne Monk, in his capacity as agent of Defendant Jones and as sole proprietor of Monk Memorials. Of the one hundred (100) consumers who have filed complaints, sixty-six (66) consumers have not received a refund or their order. Based on the information currently available to the Court and the State, *i.e.*, the consumer complaints which have been filed with the Court as Affidavits or as Exhibits to the Affidavits of Mary Clement, Director of the State of Tennessee Division of Consumer Affairs and the Affidavit of Kathleen Calligan, President of the Better Business Bureau of Middle Tennessee, or complaints from other agencies, the amount of restitution owed to these sixty-six (66) consumer victims, including a ten per cent (10%) statutory interest, is Ninety-Five Thousand Nine Hundred Sixty-Six Dollars and 68/100 (\$95,966.68).

21. Defendant Monk has engaged in trade or commerce in the State of Tennessee by offering goods or services to consumers located in whole or in part in Tennessee.

22. Defendant Monk has advertised, promoted and offered for sale headstones, grave markers and other related items and accepted payments from consumers ranging from

approximately One Hundred Twenty-Six Dollars and 00/00 (\$126.00) to Five Thousand Dollars and 00/00 (\$5,000.00) and then failed to deliver those goods as promised. Defendant Monk's promotions and transactions with consumers has been and/or remains misleading, deceptive, and unfair.

23. In 2005, Defendant Jones hired Defendant Monk to work for Jones Memorials. Allegedly, Defendant Jones fired Defendant Monk at some point that year.

24. While working for Defendant Jones in 2005, Defendant Monk's job duties included, but were not limited to, taking orders from consumers for grave markers, tombstones, and other cemetery items, and following-up on orders and leads derived from advertisements and promotions of Jones Memorials.

25. In 2007, Defendant Jones rehired Defendant Monk to assist with the operation of Defendant Jones' sole proprietorships, Jones Memorials, and later, Half Off Stones. In 2007, Defendant Monk continued his job duties of 2005.

26. Defendant Monks has failed to provide honest and non-deceptive advertising, has failed to report the delay status of consumer orders, has failed to make required disclosures, and has failed to deliver the grave markers and headstones as promised and promoted to consumers.

27. In numerous cases, Defendant Monk has taken an extraordinary amount of time beyond the promised delivery date to deliver the goods. For example, one consumer as of the filing of this complaint has waited thirty-three (33) months for delivery and has still not received the memorial marker.

28. Without success, in most cases, consumers have filed complaints with the Better Business Bureau, the Tennessee Division of Consumer Affairs, and other consumer agencies against Defendant Monk.

29. Defendant Monk, in his agency capacity for the Defendant Jones, and as the sole proprietor of Monk Memorials, falsely represented to consumer purchasers who had never received their grave markers, tombstones or other cemetery products and services ordered from Defendant Jones that the consumers, indeed, finally would receive their orders from Defendant Monk.

30. Operating under his own sole proprietorship, Monk Memorials, Defendant Monk extracted additional payments from distressed consumers with the false promise that he would produce and deliver the goods previously ordered with Defendant Jones. Defendant Monk failed to deliver the re-ordered cemetery goods and services but retained the consumers' money.

31. Defendant Monk, in his communications with the distressed consumers, falsely represented that he was working with the Attorney General. The Tennessee Attorney General sent a warning letter to Defendant Monk.

32. Defendant Monk falsely advertised that there are many good reasons for consumers to purchase headstones, grave markers and other cemetery products from Defendant Monk, when in fact, such was not the case. Defendant Monk's website, no longer online, recited that there were "22 Reasons to Buy Here."

33. Defendant Monk's website, www.monkmemorials.com, at its webpage showing its order form, falsely characterized Monk Memorials, stating that "for quality, integrity and service, there is no other."

34. Defendant Monk offers and has offered his goods or services to consumers nationwide from Nashville, Tennessee by way of his website, by advertisements in the Thrifty Nickel, by telephone, by email, key word marketing, as well as in person at the storefront on Dickerson Pike.

35. Defendant Monk has communicated with consumers in the course of his employment with Defendant Jones and in the course of his operation of Monk Memorials, by means of the following email addresses: hwaynemonk@yahoo.com, hwaynemonk@monkmemorials.com, monkmemorials@yahoo.com, halloffstones@yahoo.com and jonesmemorials@yahoo.com.

36. Defendant Monk failed to deliver the grave markers, monuments and other cemetery goods and services ordered by consumers even though Defendant Monk has been paid, in many instances, in full.

37. Defendant Monk lulled consumer purchasers into believing that their ordered cemetery items would be delivered, although delayed, by explaining away the missed deadlines and continually promising new delivery dates.

38. In other cases, consumers waited months for delivery of markers or memorials from Defendant Monk.

39. Defendant Monk required consumers to pay upfront, at the time that they placed their orders.

40. If the consumer ordered the cemetery goods and services under Defendant Monk's lay away plan, partial payment could be made at the time of the order, with the remaining balance payable upon delivery.

41. Defendant Monk has repeatedly delayed the delivery and/or failed to deliver the ordered goods and services. Defendant Monk has failed to provide refunds to eligible consumers but kept the consumers' money.

42. Defendant Monk failed to disclose, clearly and conspicuously, to consumers in their initial contacts and/or solicitations via their promotions in any media that the consumers

would have an option to cancel their orders and receive a full refund if the established delivery date for the ordered grave markers and/or other cemetery items was going to be delayed.

43. Defendant Monk, upon learning that the promised delivery date was not going to be met, failed to timely notify the purchasing consumers that the consumers had an option to cancel and receive a full refund.

44. Defendant Monk failed to clearly and conspicuously disclose the consumer's option to cancel and receive a full refund, in case of any delay in delivery.

45. Defendant Monk advertised sales and discounts on an ongoing basis, representing that these sales and discounts were of limited duration, when, in fact, such sales were continued on an ongoing basis.

46. Defendant failed to clearly and conspicuously display, in his promotions and refund policy.

47. Defendant Monk falsely advertised a one hundred per cent (100%) guaranteed services warranty and guaranteed customer satisfaction, when in fact, such was not the case.

48. The following consumer victim experiences exemplify Defendant Monk's misrepresentations and deceptive or unfair acts or practices:

- (a) A mother living in California, ordered a headstone in November, 2007 for her murdered twenty-four (24) year old son. At that time, Defendant Monk was working for Jones Memorials and Half Off Stones as a salesman and representative. Defendant Monk took the consumer's order over the telephone on behalf of Jones Memorials and Half Off Stones. The grieving family paid One Thousand One Hundred Twenty-Five Dollars (\$1,125.00) for the headstone. When the headstone failed to arrive within the time-frame represented (four to eight weeks), the mother called Defendant Monk in May 2008. Defendant Monk informed the mother who had ordered the headstone for her son's grave that he had been "fired" by Defendant Jones. Defendant Monk represented that he was willing to take over and complete the order. However, in order to complete the order through his sole proprietorship, Monk Memorials, Defendant Monk

demanded and received from the consumer an additional payment of Nine Hundred Twenty-Four Dollars (\$924.00). Defendant Monk failed to deliver the headstone and wrongfully kept the money that was paid by the consumer; and

- (b) Another consumer victim ordered a headstone in November, 2007 from Half Off Stones, and paid a Five Hundred Dollar (\$500.00) deposit. When the headstone never came, the consumer telephoned salesman Defendant Monk. Defendant Monk falsely informed the woman that he was working with the Attorney General's investigators to finish and deliver the orders that Defendant Jones had failed to complete. Defendant Monk advised the consumer that in order for Monk Memorials to complete and deliver her order, she would have to send him additional money, by check, in the amount of Two Thousand Two Hundred Dollars (\$2,200.00). The consumer sent the check in the amount of Two Thousand Two Hundred Dollars (\$2,200.00) to Defendant Monk. Even after receiving the additional check, Defendant Monk never delivered the headstone or any other products. Defendant Monk kept the consumer's money.

49. Defendant Monk has caused consumers and other persons to suffer ascertainable losses; the exact amount and number of consumers is unknown to the State.

50. Consumers from at least the States of Alaska, Arkansas, Arizona, California, Colorado, Florida, Georgia, Kentucky, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and the District of Columbia have lost the money they paid to Defendant Monk for tombstones which were not delivered as promised by Defendant Monk. In some cases, consumers were forced to purchase memorials elsewhere to mark the graves of their loved ones.

CONCLUSIONS OF LAW

Specifically, this Court finds:

51. This Court has jurisdiction of the subject matter of this case pursuant to Tenn. Code Ann. § 47-18-108 and personal jurisdiction over Defendant Monk pursuant to Tenn. Code Ann. § 20-2-201 *et seq.*

52. Venue is proper in Davidson County pursuant to Tenn. Code Ann. § 47-18-108(a)(3), because it is the county where the alleged unfair or deceptive acts or practices took place or are about to take place, the county in which Defendant Monk conducts, transacts or has transacted business and the county where Defendant Monk resides.

53. The Complaint states a claim upon which relief may be granted against Defendant Monk pursuant to Tenn. Code Ann. § 47-18-104(a), (b) and § 47-18-108.

54. This Judgment is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided at law.

55. Entry of this Judgment is in the public interest and shall be without cost bond pursuant to Tenn. Code Ann. § 47-18-108(a)(4).

56. Defendant Monk's offering of tombstones, grave markers and memorials, "memberships," investment opportunities and other products to consumers, as alleged herein, constitutes the offering of or providing of "goods" and/or "services" and constitutes "trade," "commerce" and/or a "consumer transaction" as defined in Tenn. Code Ann. §§ 47-18-103(5), (10) and (11).

57. All of the acts and practices engaged in and employed by Defendant Monk, as alleged in the Complaint, are "unfair or deceptive acts or practices affecting the conduct of any

trade or commerce” in Tennessee, which are declared unlawful by Tenn. Code Ann. § 47-18-104(a).

58. Defendant Monk has represented or implied that a consumer transaction confers or involves rights or remedies that it does not have or involve, in violation of Tenn. Code Ann. § 47-18-104(b)(12).

59. By retaining consumers' payments for headstones, grave markers, memorials, or other goods or services not delivered, Defendant Monk has engaged in conduct in violation of Tenn. Code Ann. §§ 47-18-104(a) and (b)(27).

60. By falsely representing that the Defendant Monk is or was working with the Attorney General, Defendant Monk has engaged in conduct in violation of Tenn. Code Ann. §§ 47-18-104(a), (b)(2), (b)(3), (b)(5) and (b)(27).

61. By failing to produce and deliver promised goods or services or a full refund to consumers within a reasonable time frame, Defendant Monk has engaged in conduct in violation of Tenn. Code Ann §§ 47-18-104 (b)(5), (b)(7) and (b)(27).

62. By failing to disclose, clearly and conspicuously, the consumer's option to cancel and receive a full refund, in case of any delay in delivery, Defendant Monk engaged in conduct in violation of Tenn. Code Ann. § 47-18-104 (a) and (b)(27).

63. By failing to, clearly and conspicuously, display in their promotions their refund policy, Defendant Monk engaged in conduct in violation of Tenn. Code Ann. §§ 47-18-104 (a) and (b)(27).

64. By falsely advertising, falsely promoting and falsely guaranteeing an "All Services 100% Warranty," Defendant Monk engaged in conduct in violation of Tenn. Code Ann. §§ 47-18-104 (b)(5), (b)(12), (b)(19) and (b)(22).

65. By continuing to accept new consumer orders and monies when Defendant Monk has been unable to deliver such goods and services to prior consumers, Defendant Monk has violated Tenn. Code Ann. §§ 47-18-104, (b)(12), (b)(22) and (b)(27).

66. By representing that goods will be delivered within specified time frames and then failing to deliver those goods within that timeframe, Defendant Monk has violated Tenn. Code Ann. §§ 47-18-104(a), (b)(5), (b)(27) and the F.T.C. Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435.

67. By failing to timely notify the purchasing consumers that the consumers had an option to cancel and receive a full refund in case of delayed delivery, Defendant Monk has violated the F.T.C. Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435 and Tenn. Code Ann. § 47-18-104(b)(27).

68. The acts and practices engaged in and employed by Defendant Monk as described in the unanswered Complaint are unfair and deceptive to consumers in violation of Tenn. Code Ann. § 47-18-101, *et seq.*

69. Defendant Monk has engaged in unfair acts and practices. Unfairness is not defined in the Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101, *et seq.* Consistent with Tenn. Code Ann. § 47-18-115, courts have looked to the FTC's definition of unfairness for interpretative guidance. An unfair act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Tucker v. Sierra Builders*, 180 S.W.3d, 109, 115 (2005). Consumer injury will be deemed substantial "if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers." *Tucker*, 180 S.W.3d at 116. A

"substantial injury" must be more than trivial or speculative." *Id.* "Consumers cannot reasonably avoid injury when a merchant's sales practices unreasonably create or take advantage of an obstacle to the free exercise of consumer decision making." *Id.* "Practices that unreasonably interfere with consumer decision making include (1) withholding important information from consumers, (2) overt coercion, or (3) exercising undue influence over a highly susceptible class of consumers. *Id.*

70. The Court finds that the Complaint and the entire record in this cause, including the State's Motion for Default Judgment, provide ample evidence that the Defendant Monk engaged in acts or practices that were likely to cause substantial injury to consumers which were unavoidable because the Defendant Monk withheld important information, including but not limited to: delays in delivery, the consumer's option to cancel in case of delay, and that, although Defendant Monk collected monies from the consumers, in advance, for the ordered cemetery goods and services, Defendant Monk would not deliver the ordered goods and services at all. There are no commercial benefits to these material omissions.

71. Defendant Monk has violated Tenn. Code Ann. § 47-18-104(b)(27). The Tennessee Consumer Protection Act ("TCPA") contains no definition of deception. The Court of Appeals in interpreting the TCPA has, per Tenn. Code Ann. § 47-18-115, aligned the case law definition of TCPA to the FTC Act's definitions. Deception is conduct that "causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact." *Tucker*, 180 S.W.3d at 116. The Defendant Monk has caused or tended to cause consumers to believe what is false, namely that the purchased tombstones, headstones, grave markers and/or other products and services the consumers expected to receive, having paid in advance, either by making partial payment or full payment, would never be delivered.

72. Defendant Monk is, jointly and severally, liable. The State has named Mr. Marcus Donnell Jones, individually, and two entities under his control, Jones Memorials and Half Off Stones, and Henry Wayne Monk, individually, and one entity under his control, Monk Memorials, as Defendants in this lawsuit. Defendant Wayne Monk joined Defendant Marcus Donnell Jones in making misrepresentations, offers, sales, continued extensions of delivery dates, and failing to delivery tombstones, headstones, grave markers/and/or other products and services to consumers, both as an agent for Defendant Jones and for himself and his sole proprietorship. Defendant Monk's website included www.jonesmemorials.com when he acted as an agent for Defendant Jones, www.halfoffstones.com, when he acted as an agent for Defendant Jones and www.monkmemorials.com. The Supreme Court has stated:

[W]here two or more persons engage in a common enterprise, they are jointly liable for wrongful acts done in connection with that enterprise, at least where the enterprise is an unlawful one, in which case all are answerable for any injury done by any one of them, although the damage done was greater than was foreseen or the particular act was not contemplated or intended by them.

Huckeby v. Spangler, 521 S.W.2d 568, 574 (Tenn. 1975). Further, courts flexibly analyze liability when consumer protection statutes are being enforced to meet the purposes of the consumer protection statutes. NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, §§ 11.3-4, at 632 (7th ed. 2008).

73. Pursuant to Tenn. Code Ann. § 47-18-115, this Court finds that the Tennessee Consumer Protection Act is remedial legislation necessary for the protection of the consumers of the State of Tennessee and elsewhere, and that it is to be construed to effectuate the purposes and intent set forth at Tenn. Code Ann. § 47-18-102.

74. Pursuant to Tenn. Code Ann. § 47-18-115, this Court finds that the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*, is to be construed consistently with the interpretations given by the Federal Trade Commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

JUDGMENT

PERMANENT INJUNCTION

75. Pursuant to Tenn. Code Ann. § 47-18-108(a)(1), IT IS HEREBY **ORDERED, ADJUDGED, AND DECREED** that Defendant Monk has engaged in acts or practices which violate the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*

76. IT IS HEREBY **ORDERED, ADJUDGED, AND DECREED** that Defendant Wayne Henry Monk, individually, and as sole proprietor of Monk Memorials, and each of his officers, directors, partners, subsidiaries, affiliates, managers, parents, related entities, successors, agents, representatives, sales staff, employees, agents, successors and assigns, and other persons in active concert or participation with Defendant Wayne Henry Monk who receive actual notice of this Permanent Injunction Order are **permanently** enjoined and bound or required as appropriate from the following:

(1) Pursuant to Tenn. Code Ann. §§ 47-18-108(a)(1), (a)(4), and (a)(5), this Court **permanently** enjoins and restrains Defendant Monk as defined in Definitions (*supra*) from engaging, directly or indirectly, in any marketing, advertising, promoting in any medium, offer(s) for sale or sale of tombstones, headstones, grave markers and other cemetery products and services or in any way participating in the marketing advertising, promoting in any medium, offer(s) for sale or sales or working in any other aspect of the sale, transfer and procurement of

cemetery products and services in whole or in part in Tennessee or to Tennessee consumers including, but not limited to, web design, carving or production, whether the cemetery business is owned by Defendant Monk or by another.

(2) Without limiting the scope of the injunctive relief set forth in paragraph (1), pursuant to Tenn. Code Ann. §§ 47-18-108(a)(1), (a)(4), and (a)(5), this Court **permanently** enjoins Defendant Monk directly or indirectly, from engaging in the practices set forth herein, in connection with any business in Tennessee's trade or commerce, and further, requires Defendant Monk to directly or indirectly satisfy the affirmative requirements immediately upon entry of this Judgment by Default, set forth herein:

- A. Defendant Monk shall not engage in any unfair or deceptive acts or practices in the conduct of his businesses. Defendant Monk shall fully abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*, including, but not limited to, §§ 47-18-104(a), 47-18-104(b)(1-27), which prohibit any and all unfair and/or deceptive acts or practices and the Telephone Order Merchandise Rule, 16 C.F.R. § 435.
- B. Defendant Monk shall fully comply with the FTC Mail Order Rule.
- C. Defendant Monk shall not engage in any false, unfair or misleading advertisements or promotions offering the sale of any goods or services.
- D. Defendant Monk shall not offer goods or services or otherwise accept orders for goods or services unless Defendant Monk has the financial soundness and business ability to deliver the goods and services in a timely fashion and as represented and promised to the consumer.
- E. Defendant Monk shall separately be required to affirmatively maintain and keep a quantity of goods in stock and available and employ staff sufficient to meet reasonably anticipated consumer demand.
- F. Defendant Monk shall not misrepresent the delivery date of goods and services ordered by the consumer.
- G. Defendant Monk shall, clearly and conspicuously, disclose the estimated delivery date in writing on the order and invoice provided to the consumer

at the time that the original contract for goods and services is entered into and before any monies or other valuable consideration is received from the consumer.

- H. If delivery of the ordered goods and services cannot be made at the time of the originally stated delivery date, due to unforeseen circumstances, Defendant Monk, as soon as they learn of the necessity of a delayed delivery date, shall be required to provide a timely, clear and conspicuous notice of the delay by email, telephone, and mail to the applicable consumer. This required notice shall, clearly and conspicuously, provide the new delivery date and shall offer the consumer two options:
- (i) the option to cancel and receive a full, prompt, monetary refund of all monies paid within ten (10) business days of the consumer's request; or
 - (ii) the option to accept the modified delivery date. If no consumer response is received within ten (10) business days of said notice being sent to the consumer, the consumer shall be deemed to have elected to cancel the transaction and Defendant Monk shall be required to provide the consumer a full refund of all monies paid. Defendant Monk shall be prohibited from extending any delivery date more than thirty (30) days from the originally established delivery date on the order and invoice. Defendant Monk shall maintain all records of the transactions described in this section as set forth in paragraph 76.DD.
- I. Defendant Monk shall be required to refund consumers all monies paid within no more than ten (10) business days of notification of the consumer's exercise of his/her option to cancel and receive a full monetary refund.
- J. Defendant Monk's advertisements in any medium including, but not limited to, his Internet websites shall, clearly and conspicuously, disclose the consumer's option to receive a full monetary refund and cancel the order in any situation where delivery is delayed or the goods or services are not otherwise delivered as advertised or represented during the sales transaction.
- K. Defendant Monk shall, clearly and conspicuously, disclose the full price of all charges, fees and taxes for their goods and services to the consumer in their advertisements and on the written order provided to the consumer prior to taking any monies or other valuable consideration from the consumer.

- L. Defendant Monk shall not misrepresent that the sale prices or other offers are for a limited time only (or other term or phrase of similar import), when that is not the case.
- M. Defendant Monk shall be prohibited from stating, implying or causing to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Commerce and Insurance, the Consumer Advocate and Protection Division, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of Defendant Monk.
- N. Defendant Monk shall be prohibited from representing or implying that any procedure or other acts or practices hereafter used or engaged in by Defendant Monk has been approved or endorsed, in whole or in part, by the State of Tennessee, any governmental unit of the State of Tennessee and/or the Tennessee Attorney General.
- O. Defendant Monk shall not enter into any contract or agreement with any consumer that contains any terms which would violate this Judgment, the Tennessee Consumer Protection Act of 1977 or any other law, regulation or rule.
- P. Defendant Monk shall not represent or imply that goods or services have sponsorship, approval, characteristics, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status or affiliation or connection that such person does not have.
- Q. Defendant Monk shall not represent that goods or services are of a particular standard, quality or grade, if they are of another.
- R. Defendant Monk shall not advertise goods or services with intent not to supply reasonably expectable public demand, unless the advertisement clearly and conspicuously discloses a limitation of quantity.
- S. Defendant Monk shall be prohibited from making any of the following misrepresentations, or misrepresentations of similar import, to consumers:
 - (i) That Defendant Monk provides "accelerated free shipping" (or term or phrase of similar import) if such is not the case;
 - (ii) That Defendant Monk provides "reliable insured and accurate delivery" (or term or phrase of similar import) if such is not the case;

- (iii) That consumers' satisfaction is guaranteed (or term or phrase of similar import) if such is not the case;
 - (iv) That Defendant Monk's goods and services include a "100% guaranteed warranty" (or term or phrase of similar import) if such is not the case;
 - (v) That Defendant Monk provide a warranty in connection with promised shipping deadlines (or term or phrase of similar import) if such is not the case;
 - (vi) That Defendant Monk has a history of satisfactory, solid service for a particular number of years, in whatever business Defendant Monk conduct if such is not the case; and/or
 - (vii) That Defendant Monk provide in-house production (or term or phrase of similar import) if such is not the case.
- T. Defendant Monk shall not represent, advertise or promote that they can provide or deliver any return, profit, or financial gain whatsoever, on any investment to potential investors or consumers, if such is not the case.
- U. Defendant Monk shall not advertise goods or services with intent not to sell them as advertised.
- V. Defendant Monk shall not advertise that any business is "going out of business" more than ninety (90) days before such business ceases to operate.
- W. Defendant Monk shall be required to fully comply with Tenn. Code Ann. § 6-355-401 to § 6-55-413 where a municipality has adopted the regulations of liquidation sales pursuant to Tenn. Code Ann. § 6-55-413.
- X. Defendant Monk shall not advertise any sale by falsely representing that a person is going out of business.
- Y. Defendant Monk shall not represent or imply that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law.
- Z. Defendant Monk shall not represent or imply that a guarantee or warranty confers or involves rights or remedies which it does not have or involve.

- AA. Defendant Monk shall not misrepresent or imply that a consumer transaction confers or involves rights or remedies that it does not have or involve.
- BB. Defendant Monk shall not use the consumer names, addresses, telephone numbers and other personally identifiable information gathered from consumers for any marketing purposes or any other purpose, and shall not provide them to any other person, other than law enforcement, for any reason, including for the purposes of marketing to these consumers now or in the future.
- CC. Defendant Monk shall be prohibited from selling or otherwise distributing to any other person any consumer lists or other personally identifiable information.
- DD. Defendant Monk shall respond within five (5) business days to all consumer complaints.
- EE: Defendant Monk shall not offer for sale "memberships," and shall not offer employment requiring consumers to pay upfront for the opportunity to join in Defendant Monk's business(es), and shall not offer fifty per cent (50%) rate of return, or any other rate of return on any monies invested by consumers in Defendant Monk's business(es), if such is not the case.
- FF. Immediately upon entry of this Judgment, in connection with any business(es) in Tennessee's trade and commerce conducted by Defendant Monk, Defendant Monk shall maintain consumer complaint files, alphabetized by last name, which includes at a minimum, the hard copy of the complaint, if any, of the consumer's written complaint (if by mail, facsimile or email) or a summary of any telephonic complaint, the full name of the consumer, nature of complaint, date of transaction, notes and/or copies of communications with the complaining consumers, and a hard copy of Defendant Monk's response, *e.g.* resolution by refund, cancellation or otherwise or other result. Defendant Monk shall be separately required to affirmatively maintain and keep, in a secure location in the State of Tennessee, hard copies of all orders, invoices and receipts, notices required by any injunction or court order, any correspondence and any other writings or documents generated in the course of Defendant Monk's operation of businesses and engaging in trade or commerce with a consumer, by Defendant Monk's, suppliers, or any other person until expressly otherwise ordered by the Court. That secure location shall be made available to the State's representative(s), within twenty-four (24) hours written notice from the State, during regular business hours.

77. IT IS HEREBY **ORDERED, ADJUDGED AND DECREED** that the business licenses or other licenses or certificates, if any, authorizing Defendant Monk to engage in the cemetery goods and services business in this State, because of his persistent and knowing violations of the Tennessee Consumer Protection Act, be **REVOKED** pursuant to Tenn. Code Ann. § 47-18-108(b)(2).

RESTITUTION

78. The State has the authority to seek restitution on behalf of consumers and other persons for ascertainable losses pursuant to Tenn. Code Ann. § 47-18-108(b)(1). "Ascertainable loss" is defined in Tenn. Code Ann. § 47-18-2102(1) as "an identifiable deprivation, detriment or injury arising from . . . any unfair, misleading or deceptive act or practice even when the precise amount of the loss is not known. Whenever a violation of this part has occurred, an ascertainable loss shall be presumed to exist." The Court finds that consumers have suffered ascertainable losses by making payments to Defendant Monk, in advance of Defendant Monk's anticipated delivery of the purchased goods and services, only to receive nothing for their money paid, the exact extent of which is unknown.

79. The State has not had the benefit of full discovery to receive a complete accounting of the amounts collected by Defendant Monk through his unlawful conduct. Nor did the Defendant Monk provide a complete accounting ordered by this Court on September 18, 2009.

80. IT IS HEREBY **ORDERED, ADJUDGED, AND DECREED** that the State, on behalf of each consumer listed in the consumer chart summary submitted by the State (Affidavit of Nate Casey, Collective Exhibit B, Exhibit 1), be awarded a total restitution of the amount paid by each consumer as defined in this Final Judgment and ten per cent (10%) statutory interest per

annum from the date of each consumer's purchase. Prejudgment statutory interest is available under Tenn. Code Ann. § 47-14-123.

81. Pursuant to Tenn. Code Ann. § 47-18-108(b)(1), **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant Monk is liable, jointly and severally, for ascertainable losses suffered by any known and unknown person as a result of the violations engaged in by Defendants, including statutory interest in the amount of Ninety-Five Thousand Nine Hundred Sixty-Six Dollars and 68/100. (\$95,966.68) and that this amount shall be paid by certified cashier's check(s), payable to the "Treasurer State of Tennessee – Tennessee Attorney General," and delivered to the Tennessee Attorney General's Office at the address of the undersigned, within thirty (30) days of the date of entry of this Judgment by Default.

82. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that for a period of one (1) year, from the date of entry of this Judgment by Default, up to and including the last day of this twelve (12) month window, consumers or other persons who have suffered ascertainable losses due to the unfair and deceptive acts and practices of Defendants and who have not yet complained and have not received a refund or the product ordered, will be eligible for restitution plus ten percent (10%) statutory interest if the consumers or other persons file a complaint at the Tennessee Division of Consumer Affairs, the Tennessee Attorney General's Office, the Federal Trade Commission, and/or at the Better Business Bureau of Middle Tennessee. After the twelve (12) month window closes, the Division of Consumer Affairs, by and through the Attorney General's Office shall file a Notice of Additional Consumers Eligible for Restitution, under this case number. The Notice shall contain the Affidavits of the custodian of records of each receiving agency, as exhibits, with attachments of consumer complaints timely received by that agency. Each Affidavit of the custodian of the records of the receiving agency shall provide the

total amount of restitution to be provided to consumers who complained to that agency during the window. The Plaintiff, upon entry of this Judgment by Default, shall provide a copy of this Judgment by Default, by regular mail, or by facsimile, to each agency named in this paragraph. Said Notice shall be served on Defendant Monk, who will have thirty (30) days to pay the total amount of restitution of all agencies combined, which will be set forth in the Notice, plus statutory interest, by submitting a cashier's check(s), in the total amount of restitution owed to the additional consumers, made payable to the "Treasurer – State of Tennessee, Tennessee Attorney General," delivered to the address of the undersigned.

Should no additional consumers file a complaint within twelve (12) months of the entry date, no filing will be required.

83. **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that if any payment to a consumer is returned as undeliverable and the Tennessee Division of Consumer Affairs is unable to locate the consumer or a consumer's check is not cashed within six (6) months, the funds due to such consumer pursuant to a Default Judgment in this matter shall be delivered by the Division of Consumer Affairs to the Treasurer of the State of Tennessee for treatment as unclaimed property as mandated by the Tennessee Uniform Disposition of Unclaimed Property Act, Tenn. Code Ann. § 66-29-101 *et seq.* These funds may be delivered to the Treasurer prior to the statutory due date of one (1) year set forth in Tenn. Code Ann. § 66-29-110, covering unclaimed property held by courts, public officers and agencies.

COSTS OF ADMINISTERING RESTITUTION

84. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED**, pursuant to Tenn. Code Ann. § 47-18-108(a)(4) and § 47-18-108(b)(1), that the Director of the Tennessee Division of Consumer Affairs shall administer and distribute, in its sole discretion, the consumer

restitution monies awarded to the State of Tennessee in this action in accordance with the Court's Order. This Court shall retain jurisdiction to permit the Tennessee Division of Consumer Affairs, through the Attorney General and Reporter, to seek further approval or direction relating to payment of restitution as it deems necessary or to apply for additional costs of administration.

85. IT IS HEREBY, **ORDERED, ADJUDGED AND DECREED** that Defendant Monk shall pay the cost of distribution and administration of the restitution program by the Division of Consumer Affairs, in the amount of Two Hundred Seventy-Three Dollars and 95/00 (\$273.95). These costs shall be added to the cashier's check containing the restitution amount of Ninety-Five Thousand Nine Hundred Sixty-Six Dollars and 68/00 (\$95,966.68), for a total amount of Ninety-Six Thousand Two Hundred Forty Dollars and 63/00 (\$96,240.63). Should the amount paid be less than the total amount ordered by this Court, each consumer shall receive his or her pro rata share of the amount paid and/or of any monies obtained through execution, levy or any other lawful collection method or legal action. Said amount shall be awarded to the State. Defendant Monk shall be jointly and severally liable to pay the amount of Ninety-Six Thousand Two Hundred Forty Dollars and 63/00 (\$96,240.63).

TENNESSEE CONSUMER PROTECTION ACT CIVIL PENALTIES

86. Defendant Monk has committed, at the very least, three thousand six hundred (3,600) violations of the Tennessee Consumer Protection Act. In accordance with Tenn. Code Ann. § 47-18-102, the TCPA is to be liberally construed. The Tennessee Consumer Protection Act, including its civil penalty provision, is classified as "remedial legislation." Tenn. Code Ann. § 47-18-115.

87. Based on the similarity of Washington's civil penalty statute, Rev. Code of Washington 19.86.140, and Tenn. Code Ann. § 47-18-108(b)(3) which both contemplate civil

penalties awards per violation, this Court adopts the holding of the Washington Supreme Court in *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash. 2d 298, 553 P.2d 423 (1976) which held that civil penalties should be assessed based on each respective violation.

88. There is an absence of state case law governing which factors can be considered in assessing a remedial civil penalty under the Tennessee Consumer Protection Act. This Court adopts the analysis used by a Massachusetts court which considered the Defendant's good faith and ability to pay, the injury to the public good and the desire to eliminate the benefits derived by the unfair and deceptive practice violations; and the need to vindicate the state's authority. *Commonwealth v. AmCan Enterprises*, 47 Mass. App. Ct. 330, 712 N.E.2d 1205 (1999).

89. Under *AmCan*, we must consider the injury to the public good and whether the Defendant's benefits should be disgorged. The conduct has the potential to cause enormous injury to the public good. The Defendant targeted a particularly vulnerable group. His solicitation for business was directed to those who were seeking to honor their deceased loved ones with headstones, grave markers and/or other cemetery products and services. By purporting to offer or provide cemetery products and services they knew they could not provide, by continuing to promise delivery, extending delivery dates, continuing to take orders in spite of ominous backlogs, and, finally, failing to deliver, the Defendant Monk caused victims to lose time on actually finding the cemetery products and services they needed for their family memorial. Such conduct by Defendant Monk, at a time when the consumers were grieving and suffering personal losses, can have long-lasting repercussions on the victims as well as their families.

90. Defendant Monk was not acting in good faith in making his various representations. The Defendant Monk knowingly and willingly misled consumers in his

advertisements and promotions of his cemetery goods and services and deceived consumers regarding the status of the consumers' orders, and knowingly and willingly kept the money paid by consumers for products that would not be delivered.

91. Consistent with the remedial nature of civil penalties under the Tennessee Consumer Protection Act as evidenced in Tenn. Code Ann. § 47-18-115, we must factor in the Defendant Monk's ability to pay. Defendant Monk's ability to pay is not fully known as a result of the Defendant Monk's failure to fully comply with the provision to turn over financial accounting records in the Court's Order Granting Statutory Temporary Injunction and Asset Freeze and Defendants' lack of a defense to this suit.

92. The Court notes that comparable awards have been given in other cases or settlements. In *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, the Supreme Court of Washington assessed a civil penalty of Two Thousand Dollars and 00/00 (\$2,000.00) for each violation of the Act. The language of Washington's civil penalty provision within its consumer protection statute is very similar to Tennessee's. Revised Code of Washington 19.86.140 states, "Every person who violates [Washington's Consumer Protection Act] shall forfeit and pay a civil penalty of not more than two thousand dollars *for each violation.* . . ." (Emphasis added). The TCPA's civil penalty provision states, "The court may also order payment to the state of a civil penalty of not more than One Thousand Dollars (\$1,000.00) *for each violation.*" (Emphasis added).

93. IT IS HEREBY, **ORDERED, ADJUDGED AND DECREED** that Defendant Monk, pay remedial civil penalties of not more than One Thousand Dollars and 00/00 (\$1,000.00) for each violation of the Tennessee Consumer Protection Act of 1977 to the State of Tennessee as provided by Tenn. Code Ann. § 47-18-108(b)(3). The State has requested a

conservative amount of civil penalties. The Court grants the State's request. IT IS HEREBY **ORDERED, ADJUDGED AND DECREED** that Defendant Monk is liable for civil penalties and shall deliver, within no more than thirty (30) days of entry of the Judgment, a certified cashiers' check(s), totaling One Hundred Thousand Dollars and 00/00 (\$100,000.00), payable to "Treasurer State of Tennessee – Tennessee Attorney General", to the Tennessee Attorney General's Office and delivered at the address of the undersigned.

94. Judgment is hereby awarded to the State in the amount of One Hundred Thousand Dollars and 00/00 (\$100,000.00) against the Defendant Monk, in remedial civil penalties.

ATTORNEYS' FEES AND COSTS

95. Pursuant to Tenn. Code Ann. § 47-18-108(a)(1) and (b)(4), the State may obtain costs and fees associated with the investigation and prosecution of this action under the TCPA. Based on a consideration of the following factors: (a) the time devoted to performing the legal service; (b) the time limitations imposed by the circumstances; (c) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (d) the fee customarily charged in the locality for similar legal services; (e) the amount involved and the results obtained; and (f) the experience, reputation, and ability of the lawyer performing the legal service, the State's submission for attorneys' fees and costs is fair and reasonable. The requested amount of One Hundred Twenty-One Thousand Seven Hundred Seventy-Nine Dollars and 95/100 (\$121,779.95) is a reasonable and appropriate amount to be awarded. These attorneys' fees may be used for consumer protection purpose and other lawful purpose at the sole discretion of the Tennessee Attorney General.

Based on the Affidavits attached as Exhibits to Plaintiff's Motion for Judgment by Default, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that reasonable

attorneys' fees and costs in the amount of One Hundred Twenty-One Thousand Seven Hundred Seventy-Nine Dollars and 95/100 (\$121,779.95) shall be awarded to the Tennessee Attorney General and lodged against the Defendant Monk. Defendant Monk shall submit this amount, by certified cashier's check, made payable to the "Treasurer, State of Tennessee, Tennessee Attorney General," within thirty (30) days of entry of this Judgment by Default, to the Tennessee Attorney General, delivered to the address of the undersigned.

96. This Order does not entitle Defendant Monk to seek or to obtain attorneys' fees as a prevailing party under any statute, regulation, or rule under state or federal law.

COURT COSTS

97. **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant Monk is liable to pay all court costs. Further, no costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116.

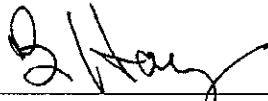
JUDGMENT BY DEFAULT AGAINST DEFENDANT HENRY WAYNE MONK, INDIVIDUALLY, D/B/A MONK MEMORIALS, D/B/A WWW.MONKMEMORIALS

98. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant Monk shall pay this Judgment by Default, including the amount of restitution, including statutory interest, civil penalties, attorneys fees, costs and expenses of investigation and prosecution and costs of the administration of the restitution program, totaling Three Hundred Eighteen Thousand Twenty Dollars and 58/00 (\$318,020.58), by submitting a certified cashier's check, within thirty (30) days of the entry date of this Judgment by Default, made payable to "Treasurer- State of Tennessee-Tennessee Attorney General," and delivered to the address of the undersigned Senior Counsel.

99. **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that execution

and/or garnishment may issue for any monetary provisions of the Judgment by Default if any amounts due and payable within thirty (30) days of entry of this Judgment by Default remain unpaid after the thirty (30) day period expires, the unpaid monies may be collected by execution, garnishment or other legal process, together with statutory interest pursuant to Tenn. Code Ann. § 47-14-121. Further, the State may obtain additional attorneys' fees and any and all costs associated with collection efforts against Defendant Monk including, but not limited to, court costs, court reporting costs, and travel costs associated with such collection efforts.

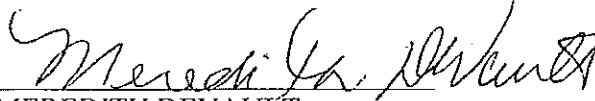
ENTERED:



Judge Barbara N. Haynes
CIRCUIT COURT JUDGE, DIV. III

SUBMITTED FOR APPROVAL:

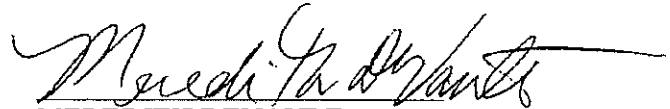
ROBERT E. COOPER, JR.
Attorney General and Reporter
B.P.R. No. 010934



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was mailed, via first class postage, prepaid to Karl D. Warden, Esq., One Washington Square, 214 2nd Avenue, Suite 103, Nashville, TN 37201 and to and Henry Wayne Monk, CIS:484321 OCA: 123841, 448 Second Ave. North, Nashville, TN 37201 and Henry Wayne Monk, 1005-B Delmas Ave., Nashville, TN 37216 on this 17th day of December, 2009



MEREDITH DEVAULT
Senior Counsel